

SALAD do not understand the Commission policy at issue or the facts of this case.

168. Glendale/SALAD are simply oblivious to the fact that when the Commission adopted minority preferences, it intended the relationship between established broadcasters (like TBN) and minority entities (like NMTV) to be a "joint venture" relationship. By definition, a joint venture is one in which the parties work together to achieve a common goal. For example, an established broadcaster (like TBN) may provide a minority broadcaster with management and technical expertise in the legal and engineering areas. Thus, the Commission has expressly held that parties to a joint venture may use the same legal and technical representation. See, e.g., Letter to Sinclair Broadcast Group, Inc. (WTTQ(TV) and WCGV-TV), FCC Reply No. 1800E1-PRG, pp. 6-7 (MMB May 20, 1994) (use of same counsel by parties with common objectives is not suggestive of common control); Harry S. McMurray, 8 FCC Rcd 3168, 3172 (Rev. Bd. 1993) (same counsel and engineering consultant represented limited and general partners in venture to apply for station permit), affirmed as modified, 8 FCC Rcd 8554 (1993).^{23/}

^{23/} See also Marlin Broadcasting of Central Florida, Inc., 4 FCC Rcd 7945, 7953 at ¶34 (Rev. Bd. 1989) (same counsel represented general and limited partners in forming joint venture to apply for construction permit); Esteban Don Lizardo & Matt Franich, 7 FCC Rcd 1678, 1686 (ALJ 1992) (to same effect), reversed on other grounds, 8 FCC Rcd 8019 (Rev. Bd. 1993).

169. Especially unjustified is Glendale/SALAD's accusation that Norman Juggert was "indifferent" to whether he had a conflict of interest when he drafted a promissory note between TBN and NMTV. (Glendale PFCL I ¶¶306, 578; SALAD PFCL ¶56.) Mr. Juggert's testimony establishes that he was not at all "indifferent" to this issue, because he carefully considered the following facts: (a) Cal. Code §9244(a)(2), which provides that a contract which might otherwise be invalid due to conflicts of interest is valid if "the contract or transaction is just and reasonable as to the corporation, taking into account its religious purposes;" (b) the contract (a promissory note) would have to be negotiated between the principals of NMTV and TBN; (c) Jane Duff was familiar with promissory notes; and (d) Mrs. Duff was in regular contact with another attorney. (Tr. 3661.) After considering these factors, Mr. Juggert decided that no conflict of interest existed. (Tr. 3662.)

170. By no stretch does that considered judgment constitute indifference. Nor does the fact that TBN and NMTV used many of the same service providers mean that "there was no distinction between Trinity Broadcasting Network and NMTV." (Glendale PFCL I ¶578). Rather, it means that there was no conflict in parties to a joint venture working together under a Commission policy that encourages one joint venture party to provide precisely such assistance to the other.

171. Finally, in criticizing Ben Miller's assistance to NMTV (Glendale PFCL I ¶576), Glendale/SALAD ignore important parts of the record as well as Commission policy. Though one could not tell from Glendale/SALAD's submission, a specific record comparing Mr. Miller's management responsibilities for TBN and his functions for NMTV was carefully developed. (TBF PFCL ¶202.) That record shows that Mr. Miller spends less than one hour per month performing services for NMTV's Portland station and that he speaks to the Portland station's chief engineer only three or four times a year. (Glendale Ex. 210, pp. 35, 97.) By contrast, Mr. Miller supervises over 100 employees in his position as TBN's Vice President of Engineering. (Id., p. 11.)

172. Moreover, though ignored by Glendale/SALAD, a specific record was developed regarding Mr. Miller's place in the chain of command for TBN stations and the chain of command for NMTV stations. At TBN, Mr. Miller directly supervises over 100 engineers, including direct supervision of the Chief Engineers at TBN stations. (Id., pp. 11, 138.) By contrast, NMTV's station engineers have always been directly accountable to their Station Managers, rather than being accountable to Mr. Miller. (Id., p. 35.) Mr. McClellan, the Portland Station Manager, explained in response to specific examination on this subject that the chain of command at the Portland station is for the Chief Engineer, Mr. Fountain, to report to him about his

desire to receive Mr. Miller's assistance, and for Mr. McClellan then to ask Mrs. Duff's permission. (TBF PFCL ¶202.)

173. To bolster their case, Glendale/SALAD make several other extremely strained arguments. For example, they note that Mr. Miller "reviewed technical discrepancy reports for Odessa and Portland on a monthly basis." (Glendale PFCL I ¶282.) However, they fail to note that he only spent 30 seconds per month reviewing each such report. (Glendale Ex. 210, p. 98.) Likewise insignificant is Glendale's statement that Mr. Miller "could request the assignment of NMTV employees for Trinity Broadcasting Network projects." (Glendale PFCL I ¶282.) People in control do not "request." They direct.^{24/}

174. Furthermore, to the extent Mr. Miller has assisted NMTV, such assistance is perfectly permissible because NMTV and TBN are engaged in a joint venture, and broadcasters engaged in a joint venture may share technical expertise without transferring de facto control of their stations. (¶¶12, 13, 168 above.) It follows that TBN employees' engineering assistance in connection with NMTV's low power stations (Glendale PFCL I ¶271;

^{24/} Glendale/SALAD also note that Mr. Miller "sometimes used his home address when acting as a 'consultant' suggesting vaguely that it reflected work done at home and also that it was something he just did." (Glendale PFCL I ¶287.) Glendale/SALAD apparently are insinuating that Mr. Miller wanted to conceal his relationship with TBN. In fact, Mr. Miller explained that "the main reason" for his use of his home address "is because I do perform some functions from my home and I do put that down from time to time." (Glendale Ex. 210, p. 55.) Thus, there is nothing dishonest about Mr. Miller's use of his home address when he works on his home computer.

SALAD PFCL ¶57) is also legally irrelevant to whether TBN controls NMTV.

175. In short, TBF PFCL ¶¶188-213, 590-600, and 613-27 accurately state the facts and the law on this subject and should be adopted.

(3) Programming

176. The programming arguments advanced by Glendale/SALAD are at odds not only with the facts of this case, but with constitutional and statutory provisions that protect free speech and religious expression. Although Glendale/SALAD blow much smoke, the record does not show that TBN or Paul Crouch have exercised improper control over NMTV's programming.

177. Glendale/SALAD do not dispute that NMTV's Directors desire to affiliate with TBN. (TBF PFCL ¶176.) Nor do they dispute that NMTV's Affiliation Agreements comply with established Commission guidelines. (See cases cited at TBF PFCL ¶¶605-07.) Thus, NMTV's program affiliation with TBN does not constitute de facto control. Moreover, Glendale/SALAD do not cite a single instance where TBN has dictated the content of any local program broadcast by NMTV. In short, nothing close to de facto control over NMTV's programming has been shown.

178. Glendale/SALAD's arguments to the contrary do not withstand scrutiny. They argue, for example, that TBN controls NMTV because NMTV "had in fact never considered canceling its

affiliation with Trinity Broadcasting Network nor had it ever carried programming from other networks that its agreement would theoretically permit." (Glendale PFCL I ¶582.) That argument is simply beside the point. The Commission does not require licensees to prove their independence by actually exercising their program preemption or termination rights. See cases cited at TBF PFCL ¶607. The dispositive issue is not whether NMTV has chosen to exercise those options, but whether it has the right to do so whenever it wishes. NMTV does have that right. Hence, it controls its programming.

179. Glendale/SALAD next argue that NMTV's contractual protections "would be meaningless if NMTV were in fact controlled by Trinity Broadcasting Network, since in that circumstance NMTV would necessarily comply with the dictates of Trinity Broadcasting Network irrespective of what hypothetical rights might be specified in that agreement." (Glendale PFCL I ¶582.) That argument is specious for three reasons. First, the argument is circular: TBN controls NMTV, thus the contract terms are meaningless, thus TBN controls NMTV. Second, if the special contractual protections are meaningless because TBN controls NMTV, as Glendale/SALAD contend, then Jane Duff would have had no reason to secure those protections (which apply only to NMTV and to no other TBN affiliate). Third, the argument obscures the true significance of NMTV's special contractual protections, which is that Mrs. Duff placed NMTV's interests ahead of TBN's interests when she inserted those provisions into the Affilia-

tion Agreements. (TBF PFCL ¶¶178-80, 605.) NMTV's control over its programming is established by the Affiliation Agreements without regard to the special protections that Mrs. Duff included.

180. There is no merit to Glendale/SALAD's effort to minimize the unique contract rights that Mrs. Duff secured for NMTV. (Glendale PFCL I ¶582.) First, while it is true that TBN also has the right to cancel on 120 days notice, the standard TBN affiliation agreement gives TBN the unreciprocal right to terminate. (TBF PFCL ¶179.) Thus, NMTV has significantly greater rights than other affiliates. Second, it is pure speculation to contend that NMTV's right to cancel the affiliation is meaningless because NMTV's "viability depended upon its carriage of Trinity Broadcasting Network Programming and it would be unlikely that an equally viable alternative format could be put in place in 120 days." There is no evidence for that proposition at all.^{25/} Third, no one can see the future, and Mrs. Duff's only reason for securing these additional rights for NMTV was to protect its future. The rights she secured are legally enforceable rights that NMTV can exercise if it chooses. Their inclusion in the Affiliation Agreements is evidence that TBN does not control NMTV.

^{25/} In fact, Mrs. Duff correctly recognized that NMTV, not TBN, had the greatest leverage because TBN depended on survival of the affiliation to get its loans repaid. (TBF Ex. 101, p. 42.)

181. With respect to NMTV's local programming, Glendale/SALAD cite no instance where TBN controlled program content. That is no accident. NMTV's local programs are oriented toward the specific needs of Portland, and NMTV produces and decides the content of each program. Simply put, Glendale/SALAD have not shown that TBN ever told NMTV what to broadcast.

182. Lacking evidence of any improper assertion of control over local program content, Glendale/SALAD try to manufacture an argument based on two matters, both of which they distort. Specifically, they argue that (a) TBN's de jure contract to sponsor Joy in the Morning ("Joy"), and (b) NMTV's adoption of TBN "guidelines" for Northwest Praise the Lord ("Northwest PTL"), constitute de facto control. (Glendale PFCL I ¶¶120-23.) Neither argument has merit.

183. Initially, assuming arguendo that the Joy agreement constituted control over NMTV's program content (which it does not), a contract covering a single program does not establish de facto control over all NMTV programming. Moreover, the very existence of the agreement belies the notion of de facto control, for no written agreement would have been needed if TBN had de facto control. In truth, the Joy agreement is simple and proper. NMTV produces a local program and determines all topics and guests. TBN sponsors the program and gets the right to broadcast it over the whole network. NMTV is thus able to produce an excellent local program at a substantially lower cost

than it would otherwise incur, while TBN obtains an additional program for its network viewers. There is nothing at all unreasonable or improper about that arrangement.

184. During the hearing, James McClellan explicitly testified that NMTV does not seek TBN's clearance for guests selected to appear on Northwest PTL. In his words, "We do it all ourselves." (Tr. 4424.) Glendale/SALAD did not ask him about the process for selecting guests and topics for Joy, because they knew that the answer is the same. There is simply no evidence that TBN has had any involvement in determining the guests, topics, and content of Joy programs, because it has not.^{26/}

185. None of the sections of the Joy agreement on which Glendale/SALAD rely is relevant to the issue of ultimate control over programming. For example, while they note that TBN has reserved all intellectual property rights in the program (MMB Ex. 383 ¶¶1, 11(a); Glendale PFCL I ¶121), copyright law relates

^{26/} Although NMTV brought Mr. McClellan from Portland to Washington to testify, Glendale/SALAD studiously avoided asking him about matters they now deem pertinent. Not only did they avoid any questions about TBN involvement in the content of Joy (answer: none), they also avoided asking why he sent a memorandum to Ruth Brown of TBN's Personnel Department regarding the hiring of an Assistant Producer for Joy, even though it was clear at the hearing that to learn the facts the parties "would have to ask Mr. McClellan that." (Tr. 2973.) Having avoided addressing those subjects with the witness, Glendale/SALAD now raise innuendoes rather than cite facts. The Presiding Judge should disregard proposed findings based on innuendo by parties that chose not to develop the facts directly from a knowledgeable witness who was produced for cross examination at their request.

primarily to who owns a program after it is aired and has nothing whatsoever to do with content control -- i.e. who decides what programs are aired, and what is on the program when it is aired. TBN may "own" Joy for copyright purposes, but it does not dictate the contents of Joy.^{27/}

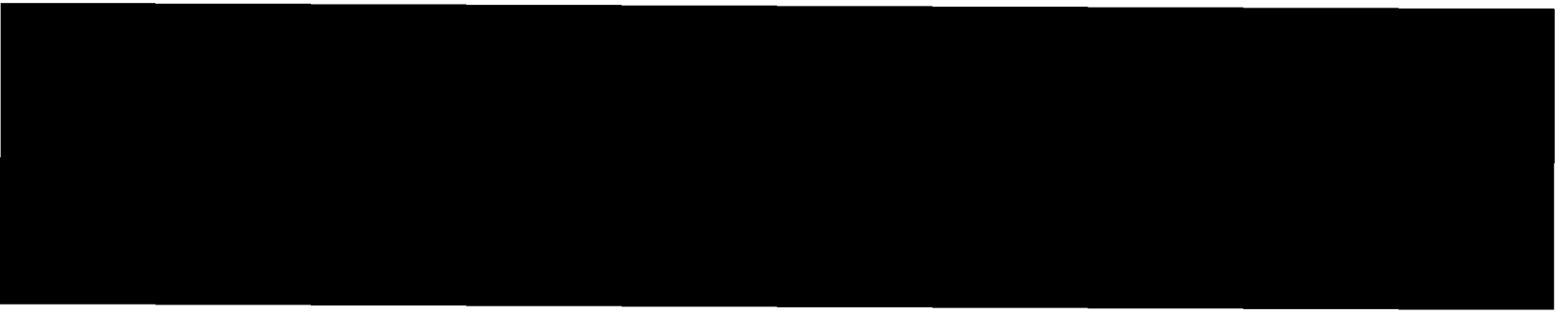
186. Glendale/SALAD also rely on Section 2 of the agreement, which provides that the format of Joy "shall be documentary and public affairs in style with various segments, including panel discussions and such additional interviews as the Producer and Sponsor may agree upon from time to time." (MMB Ex. 383 ¶2(a).) While SALAD interprets this provision to mean that TBN has the "right to 'agree upon' the program's content with NMTV" (SALAD PFCL ¶63), common sense dictates that control of programming does not mean merely the power to decide general format, but the power to determine exactly what is televised. For example, the sponsors of Meet the Press would control that

^{27/} Glendale/SALAD apparently make this argument not for the purpose of showing who controls NMTV's programming, but to sling mud at Jane Duff for testifying that Joy "was given" to NMTV by TBN. (Glendale PFCL I ¶580; Tr. 2177.) In typical fashion, Glendale/SALAD did not ask Mrs. Duff what she meant by that phrase so she could explain it before being charged with lacking candor, but clearly she was not thinking in terms of copyright law. Rather, what happened was that Joy originally was produced by TBN in Tustin, California, to meet the needs of that community. Through the Joy agreement, the program became produced by NMTV in Portland to meet the needs of NMTV's community of license. That is clearly what Mrs. Duff meant when she said the program "was given" to NMTV. (See Tr. 2176: "Well, it was a, it was a production of NMTV and TBN would pay for, pay National Minority for the, the program itself, but it was actually a National Minority program at this point.") For Glendale/SALAD to call their own semantic misconstruction an intentional lack of candor by Jane Duff is vicious and wholly unwarranted.

program if they dictated that guest W would appear on week X and take position Y on issue Z, but would not control the program if they merely agreed that Meet the Press would be a public affairs interview program. Similarly, TBN would control Joy if it told NMTV who the guests would be and what topics would be discussed. Since Section 2 merely states that Joy is a public affairs program, that provision cannot support a conclusion that TBN controls the content of Joy. Similarly, Section 2(b) of the agreement (which specifies that the parties will determine the length of Joy) is unrelated to program content and therefore does not reflect de facto control.

187. Glendale/SALAD also attack provisions of the agreement requiring that Joy not expose TBN to "public ridicule or censure" and that Joy "shall be of high quality in all respects." (MMB Ex. 383 ¶¶2(b) and 2(e).) As no sponsor wants to endorse a program that is in bad taste or of poor quality, there is nothing unusual about this provision.

188. Glendale/SALAD suggest that Trinity had "veto power" over the contents of Joy based on contract provisions stating that (a) TBN shall be entitled to approve the producers, participants, and announcers of Joy, (b) Mr. McClellan would play the "primary role" in the program, and (c) NMTV must "consult" with Trinity on program content. (MMB Ex. 383 ¶¶2(e) and (g), 4; Glendale PFCL I ¶121; SALAD PFCL ¶63.) However,



The first two relate to personnel rather than program content, and are therefore irrelevant to the question of whether NMTV exercised ultimate control over its own programming. Moreover, one can easily identify situations where a sponsor is interested in personnel but does not control programming. For example, suppose AT&T sponsors the Barbara Walters show. If AT&T's sponsoring agreement requires Ms. Walters to appear on her own show, that could hardly be taken to mean that AT&T controls the stations broadcasting Barbara Walters. Moreover, a right to "consult" is not a right to "control." Again, Glendale/SALAD offer no evidence that TBN controlled any Joy program.

189. Glendale/SALAD further note that Section 7 of the agreement allows TBN to compensate NMTV by reducing NMTV's outstanding debt (MMB Ex. 383 ¶7; Glendale PFCL I ¶12; SALAD PFCL ¶63). Glendale/SALAD do not explain, however, what this provision has to do with NMTV programming.

190. Likewise without merit is the contention that TBN controls Northwest PTL because the program was subject to Trinity "guidelines." (Glendale PFCL I ¶¶123, 581.) Glendale/SALAD do not specify what the alleged "guidelines" are. James McClellan testified that although Northwest PTL follows "some guidelines" as to format, "as far as the other guidelines that say that they have to check their people through TBN, ~~we do not check through anyone there.~~" (Tr. 4424; emphasis added.) Thus,

the record establishes that NMTV retains and exercises complete control over the content of that program.

191. Glendale/SALAD note that Northwest PTL and Northwest Focus are similar to programs carried by other TBN affiliates (Glendale PFCL I ¶¶127, 581; SALAD PFCL ¶¶62, 64). However, that fact does nothing to establish who made NMTV's decisions. Moreover, many TBN program affiliates broadcast programs of that general nature, and it is hardly surprising that Mrs. Duff would employ a familiar format.^{28/} Equally beside the point are references to the amount and timing of NMTV's local programming (Glendale PFCL I ¶117; SALAD PFCL ¶64), since the only relevant point is who made NMTV's decisions on those matters. Glendale/SALAD completely ignore the irrefutable evidence establishing that NMTV planned local production and expended substantial sums for studio acquisition and construction long before the petition to deny the Wilmington application was filed. (TBF PFCL ¶¶181-86.) And although Glendale/SALAD also see de facto control in the fact that NMTV broadcasts TBN's telethons (Glendale PFCL I ¶125), NMTV has freely chosen to do that. Nothing about that decision represents de facto control on the part of TBN.

^{28/} In the same vein, Glendale/SALAD note that the Portland station's "prayer partner line" and food and clothing ministries are similar to projects that TBN administers (Glendale PFCL I ¶126). However, such outreach projects have nothing to do with who makes NMTV's programming decisions. Moreover, Mrs. Duff has a long history in television ministry that pre-dates her association with TBN. (TBF PFCL ¶56.)

192. In sum, Glendale/SALAD have not come close to establishing that TBN or Paul Crouch improperly control NMTV's programming. Moreover, a Commission decision finding de facto control from the fact that NMTV chooses to broadcast TBN programming, or that it does not carry enough non-TBN programming, would violate §326 of the Communications Act and the First Amendment. (TBF PFCL ¶¶605-07, 678-79.)^{29/} On the issue of control of NMTV's programming, TBF PFCL ¶¶176-87, 605-12, and 678-79 accurately state the facts and the law and should be adopted.

4. Abuse of Process Allegations

193. Glendale/SALAD's position on abuse of process rests on three contentions: (a) that it was unreasonable for TBN and NMTV to rely on the legal advice of Colby May; (b) that Paul Crouch intentionally submitted erroneous claims for diversification preferences; and (c) that TBN and NMTV intentionally lacked candor in dealing with the Commission. The first contention (reliance on counsel's advice) is answered in ¶¶26-36 above and 233-42 below. Glendale/SALAD's other two arguments are addressed in the following sections.

^{29/} Indeed, at the evidentiary admission session, SALAD itself argued that rulings which measure a station's specific programming would "offend Section 326." (Tr. 481.)

a. The Diversification Preference

194. The issue in this proceeding regarding translator and low power applications is whether NMTV knowingly claimed improper "minority" preferences in such applications. HDO ¶48, Issue (b). During the hearing, the Mass Media Bureau recognized the coincidence that Janice Crouch was added to TBN's Board on the same day that the Commission released its Report and Order adopting minority and diversification preferences in translator and low power lotteries. (MMB Ex. 57; Random Selection Lotteries, ¶9 above.) The Bureau therefore diligently developed the record to determine whether the addition of Janice Crouch to TBN's Board was for the purpose of enabling NMTV to claim diversification preferences and, if so, whether that fact in turn related to NMTV's minority preference claims, the specific designated issue.^{30/} Having developed a full record on the matter at the hearing, the Bureau has now objectively evaluated the evidence and proposes no conclusion that Janice Crouch was added to TBN's Board to enable NMTV to claim diversification preferences. The record will support no other conclusion.

195. The evidence shows that on May 27, 1983, the Commission released a 74-page document adopting minority and diversification preferences for translator and low power applications.

^{30/} See Ramon Rodriguez and Associates, Inc., 9 FCC Rcd 3275, 3278 (¶21) (Rev. Bd. 1994) (incidents that are not part of the specific issue designated by the Commission may not be considered).

Random Selection Lotteries, ¶9 above. The Commission action established no timetables or deadlines for claiming the preferences. On the release date, May 27, 1983, TBN's FCC counsel had not yet opened their new law office and were not receiving Commission news releases. (Tr. 3272-73, 3570.) The corporate action adding Janice Crouch to TBN's Board required the participation of Norman Juggert, a TBN Director and local counsel, whose office was located 20 to 30 miles from TBN's headquarters. (Tr. 3906.) Although TBN often held urgent Directors' meetings by telephone conference call, the election of Janice Crouch to the Board took place at a pre-planned meeting held on May 27, 1983, at TBN's headquarters. (Tr. 3906-07; MMB Ex. 57.) There is no evidence that the meeting was hastily arranged in light of the Commission's action that same day.

196. Thus, to conclude that Janice Crouch was added to TBN's Board for the purpose of enabling NMTV to claim diversification preferences, one must find the following: (a) that although they had no office and were not receiving Commission news releases, TBN's FCC counsel received the Report and Order on the day it was released; (b) that although they were not then actively practicing, they immediately read and analyzed the 72-page document in time to provide emergency advice to TBN the same day; (c) that although the Report and Order specified no deadline for claiming diversification preferences, they nonetheless concluded that an emergency existed which required instantaneous action; and (d) that although that action could readily

have been taken through the expedient of a telephone call, Mr. Juggert jumped in his car and drove 20 to 30 miles for an in-person meeting that would have lasted only a few minutes.

197. That scenario is plainly fanciful. Viewing the record objectively, the Bureau, which took the lead role in identifying and developing this subject, has correctly recognized that the record supports no conclusion that Janice Crouch was added to TBN's Board to enable NMTV to claim diversification preferences. Consequently, the Bureau correctly recognizes that there is no need to address the further question of whether, if such an intention had existed, that matter was related to the minority preference claims at issue in this case.

198. Glendale/SALAD, on the other hand, overreach once again. Unlike the Bureau, they urge the Presiding Judge to adopt the foregoing absurd scenario as fact. Indeed, lacking evidence that Paul Crouch had anything to do with NMTV's diversification preference claims, they nonetheless urge that he personally intended by those claims to mislead the Commission. This alleged intention to mislead on diversification claims then somehow becomes an intention to mislead on the minority preference claims that are at issue. (Glendale PFCL I ¶621; SALAD PFCL ¶9.) Glendale/SALAD make that arbitrary connection by inventing what they call "the minority/diversification preference" (Glendale PFCL I ¶¶51, 53), pretending that the two preferences are one and the same. Of course, they are not.

There is a minority preference and a separate diversification preference, and they cannot be made into the same thing by semantic artifice.

199. In short, the Bureau's assessment of this matter is clearly correct. The record does not support the conclusion that Janice Crouch was added to TBN's Board for the purpose of enabling NMTV to claim diversification preferences. Therefore the second question -- whether such a purpose related to the minority preference claims at issue here -- need not be reached. Glendale/SALAD's contrary argument should be rejected as clearly erroneous and beyond the scope of the designated issues.

b. Lack of Candor Allegations

200. Glendale/SALAD make sweeping lack of candor allegations that are uniformly specious. These indiscriminate charges contrast sharply with the Mass Media Bureau's submission. The Bureau does not find that any witness or any NMTV filing intentionally lacked candor, even though many of Glendale/SALAD's allegations focus on NMTV's responses to the Bureau's own questions and requests for information.

(1) The Allegations Violate Principles of Fairness

201. The Commission has admonished parties not to make indiscriminate lack of candor charges like those involved here. The law in this respect is clear:

"Misrepresentation and lack of candor charges are very grave matters. They ought not be bandied about." Scott and Davis Enterprises, Inc., 88 FCC 2d 1090, 1099 (Rev. Bd. 1982).

That admonition applies specifically to efforts to scour an extensive hearing record for alleged instances of lack of candor. Adell Broadcasting Corp., 99 FCC 2d 477, 481 (Rev. Bd. 1984), rev. denied, FCC 85-382 (July 26, 1985), affirmed sub nom. Michigan Channel 38, Inc. v. FCC, 808 F.2d 137 (D.C. Cir. 1986). In language that is particularly apt to Glendale/SALAD's contentions, the Board in Adell described the great harm that such efforts cause to Commission proceedings and observed:

"Given the ingenuity of counsel and the zeal with which they urge causes, it will be the rare case in which witness testimony cannot be subject to attack (however frivolous in fact) at the conclusion of the case on grounds that the witness lied or was less than forthcoming in his testimony." 99 FCC 2d at 482.

202. Reinforcing those principles, the Commission has properly required elementary fairness in the presentation of candor charges. Indispensable to fairness is that the party charged with lacking candor be confronted with the charge and given the opportunity to explain.^{31/} Here, as shown below,

^{31/} See, e.g., Garrett, Andrews & Letizia, 88 FCC 2d 620, 625 (1981) (lack of candor cannot be found where opposing party had "ample opportunity" to make "specific inquiries" into the allegedly questionable statements "but declined to do so"); Arizona Mobile Telephone Co., 93 FCC 2d 1147, 1153 (1983) (lack of candor not found when applicant lacked "an opportunity to present evidence or otherwise rebut the [Review] Board's candor findings"); Fox River Broadcasting, 93 FCC 2d 127, 128-29 (1983) (seemingly inconsistent statements did not establish deception where "discrepancy was not called to [broadcaster's] attention during the deposition session"). Cf. Fed. R. Evid. 613(b) (continued...)

Glendale/SALAD are accusing people of lacking candor on many things about which they were never asked or given the chance to explain.

203. Fundamental fairness also requires that candor allegations not be made when there is no evidence of intentional deception. Fox River Broadcasting, supra. Here, Glendale/SALAD level conclusory charges without establishing the requisite element of willful intent. On the same evidentiary record, the Bureau correctly states that "the evidence does not support a conclusion that Crouch, TBN or NMTV intended to deceive the Commission.... [T]here is no reason to believe that denial of TBF's application is necessary to ensure the future reliability of Crouch and TBN or the truthfulness of their submissions." (MMB PFCL ¶¶310-11.) The Bureau has been extremely attentive to the issues concerning TBN's qualifications, and its conclusion reflects an accurate and objective evaluation of the record.

204. Fairness also requires a clear specification of the matters at issue. West Coast Media, Inc. v. FCC, 695 F.2d 617, 619 (D.C. Cir. 1982). Here, no specific candor issue was specified. Instead, while the HDO found no evidence that NMTV intended to deceive the Commission, it permitted Glendale/SALAD

^{31/} (...continued)

("[e]xtrinsic evidence of a prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same"); U.S. v. IBM, 432 F. Supp. 138, 139 (S.D.N.Y. 1977) (one major objective of Rule 613(b) is to give witnesses "a chance to deny or explain [an] apparent discrepancy").

under the abuse of process issue to explore the specific lack of candor allegations they had raised. HDO ¶39. However, Glendale/SALAD did very little to pursue that with NMTV or TBN principals at the hearing. Thus, they are left where they were at the time of designation -- without "a prima facie showing of intent to deceive." (See also MMB PFCL ¶¶310-11.) The Commission's determination in the HDO is therefore binding. Atlantic Broadcasting Company, 5 FCC 2d 717, 721 (1966).^{32/} Glendale/SALAD have no right to raise a blizzard of candor allegations for the first time in proposed findings when no candor issue was specified and the witnesses were given no opportunity to address or explain.^{33/}

205. For these reasons, Glendale/SALAD's lack of candor allegations warrant no consideration. Adell Broadcasting Corp., supra. (¶201 above.) If they are considered, they should be rejected as spurious.

(2) The Allegations Are Spurious

206. In an effort to relate their lack of candor allegations to the designated abuse of process issue, Glendale/SALAD

^{32/} "If our designation order contains a reasoned analysis of a particular matter, we are confident that, in the absence of additional information on the subject previously unknown to us, the subordinate officials will have no difficulty in adopting that analysis and denying the relief requested." Id. at 721.

^{33/} Indeed, to have anticipated Glendale/SALAD's myriad candor allegations TBF, TBN and NMTV would have had to submit a written direct case that specifically explained virtually every line of every pleading and filing they had made.

rely on WWOR-TV, Inc. (Glendale PFCL I ¶¶628, 639.) See ¶¶33, 35 above. That case, however, is wholly inapposite. As previously indicated (p. 23, n. 5, and ¶35 above), the pertinent facts in WWOR-TV were as follows: (a) prior to hearing, the applicant knew that the date of its formation meeting had crucial importance; (b) the Commission had ordered the applicant to produce all documents which established that date; (c) the applicant possessed such documents; (d) the applicant disobeyed the Commission's order to produce them; (e) the applicant gave misleading testimony about the date the meeting occurred and the reasons for filing its application; (f) the ALJ was deceived and approved the proposed settlement; (g) the Commission was unconvinced and remanded for further hearings; (h) the previously withheld documents were turned over; (i) the applicant then changed its story at the remand hearing; (j) the documents establishing when the formation meeting occurred proved that the applicant could not have filed its application for the reason it had said; (k) the applicant therefore was found to have filed its application for an improper purpose that it tried to conceal through violation of a Commission order to produce documents. That is abuse of process. That is not this case.

207. Glendale/SALAD's allegations pale against what happened in WWOR-TV. Glendale/SALAD begin their proposed candor conclusions by arguing that "[t]he initial claims of the low power minority preference, which occurred in 1984 amendments to applications filed in 1980 and 1981, provided no details of the

relationship between Trinity Broadcasting Network and NMTV." (Glendale PFCL I ¶629.) That argument answers itself once it is recognized that the NMTV applications in question contained substantial details of the relationship between TBN and NMTV. (TBF PFCL ¶¶21-22.)

208. Specifically, the applications identified the following links between TBN and NMTV: (a) Paul Crouch was the Founder, President, and a Director of NMTV; (b) TBN was "associated with [NMTV] by virtue of its two common (officers/) directors"; (c) the common officers/Directors were Paul Crouch and Jane Duff; (d) Paul Crouch, one of the NMTV Directors, was President and Director of TBN and its various stations; (e) Jane Duff also was a Director and officer of TBN and its various stations; (f) TBN planned to loan money to NMTV for the construction and operation of the stations; and (g) NMTV would rebroadcast TBN's signal from KTBN. (Id.) Thus, the minority preference certifications were associated with applications that contained the very disclosures that Glendale/SALAD say were missing. To call this a lack of candor is frivolous.

209. Moreover, even if NMTV's applications had not contained the foregoing information, no intent to deceive could be found because no witness was asked why such information was omitted. Willful intent to deceive cannot be found simply because Glendale/SALAD allege it. A finding must be based on evidence, and the accused must be given an opportunity to

explain what happened. Fox River Broadcasting, Garrett, Andrews & Letizia, and other authorities cited at ¶¶202-03 above.

210. Glendale/SALAD also allege that Norman Juggert's testimony "falsely sought to minimize his involvement with NMTV by stating that he had only represented NMTV in connection with certain matters while simply omitting a number of other matters where he provided representation for NMTV." (Glendale PFCL I ¶635; emphasis added.) More specifically, they allege that Mr. Juggert "cited as the only legal services he has provided to NMTV his handling of the initial incorporation and request for tax exemption; the name change; and the lease matter." (Id. ¶296; emphasis added.) That argument, too, is misleading and specious.

211. Initially, the word "only" -- used twice by Glendale/SALAD -- does not appear in Mr. Juggert's testimony at all. It is Glendale/SALAD's word, not his. In his written testimony, Mr. Juggert does state that "[o]ver the years I have from time to time provided services to NMTV," and that "An example of a service performed for NMTV but not billed is an action by written consent of the NMTV Board I prepared in June 1987 involving indemnification of officers and directors against claims." (TBF Ex. 108, pp. 2, 4; emphasis added.) The use of phrases such as "from time to time" and "an example" clearly indicates that Mr. Juggert provided other services to NMTV as well.

212. Moreover, as Glendale well knows, Mr. Juggert was deposed in this proceeding and testified that he performed other services for NMTV, such as drafting the current promissory note from NMTV to TBN, investigating the possible loan to Community Brace, and giving legal advice regarding Directors' liability. It is well settled that no intent to deceive may be found where an applicant has disclosed relevant information in prehearing discovery. See Omaha Channel 54 Broadcasting Group, Limited Partnership, 3 FCC Rcd 870, 871 (Rev. Bd. 1988), review denied, 3 FCC Rcd 6136 (1988) ("we cannot find any intent to deceive" where pertinent information was disclosed in prehearing discovery) (emphasis in original); Intercontinental Radio, Inc., 98 FCC 2d 608, 639-40 (Rev. Bd. 1988) ("when accurate information previously supplied by a party is a matter of open Commission record, an intent to categorically misrepresent....is difficult to find"). Furthermore, not only did Mr. Juggert himself at his deposition give Glendale the information it used at the hearing, but he knew well that he would be called for cross-examination and would be examined about that information at the hearing. In these circumstances, to suggest that his direct testimony involved a willful intent to deceive the Commission is preposterous.

213. Next Glendale argues that Mrs. Duff "seriously" lacked candor when she testified that she "negotiated" the letter of credit for NMTV's Wilmington acquisition. (Glendale PFCL I ¶¶189, 636.) If Glendale had evidence that Mrs. Duff's